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Revisor R-4181

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE GAMBLING CONTROL BOARD

In the Matter of Gambling Control Board Draft Rules

ORDER ON REVIEW OF RULES UNDER MINN. STAT. § 14.26

The Minnesota Gambling Control Board (Board) is seeking review and approval of the above-entitled rules, which were adopted by the agency without a hearing. This review and approval is governed by Minn. Stat. § 14.26. On January 29, 2014, the Office of Administrative Hearings (OAH) received the documents that must be filed by the Board under Minn. Stat. § 14.26 and Minn. R. 1400.2310. Based upon a review of the written submissions and filings, and for the reasons set forth in the Memorandum that follows,

IT IS HEREBY ORDERED:

1. The following rules or parts thereof are not approved:

   A. Minn. R. 7861.0210, Subp. 44, Item B(15)
   B. Minn. R. 7861.0285, Subp. 3, Item E(2) and 7861.0290, Subp. 4, Item F(2)
   C. Minn. R. 7863.0270, Subp. 7
   D. Minn. R. 7863.0270, Subp. 9
   E. Minn. R. 7863.0270, Subps. 26 and 27
   F. Minn. R. 7863.0270, Subp. 29, Item C
   G. Minn. R. 7863.0270, Subp. 30
   H. Minn. R. 7863.0270, Subps. 36, Items (F) and (G)(3)
   I. Minn. R. 7864.0235, Subp. 6
   J. Minn. R. 7864.0235, Subp. 33, Item C

2. All other rules or parts thereof are approved.

3. Pursuant to Minn. Stat. § 14.26, subd. 3(b), and Minn. R.1400.2300, subp. 6, the rules will be submitted to the Chief Administrative Law Judge for review.

Dated: February 12, 2014

s/Barbara J. Case
BARBARA J. CASE
Administrative Law Judge

MEMORANDUM

The Board has submitted these rules to the Administrative Law Judge (ALJ) for review under Minn. Stat. § 14.26. Subdivision 3(a) of that statute specifies the ALJ must approve or disapprove the rules as to their legality and form. In conducting the review, the ALJ must consider the issues of whether the agency has the authority to adopt these rules; whether the record demonstrates a rational basis for the need and reasonableness of the proposed rules; and whether the rules as modified are substantially different from the rules as originally proposed.[1]

The rules of the Office of Administrative Hearings identify several types of circumstances under which a rule must be disapproved by the Administrative Law Judge or the Chief Administrative Law Judge.[2] These circumstances include proposed rules that exceed, conflict with, do not comply with, or grant the agency discretion beyond what is allowed by its enabling statute or other applicable law; a rule that was not adopted in compliance with procedural requirements, unless the Judge finds that the error was harmless in nature and should be disregarded; a rule that is not rationally related to the agency's objectives or the agency has not demonstrated the need for and reasonableness of the rule; a rule that is substantially different than the rule as originally proposed and the agency did not comply with required procedures; a rule that is unconstitutional[3] or illegal; a rule improperly delegates the agency's powers to another entity; or the proposal does not fall within the statutory definition of a "rule."[4]

1. Defects in Proposed Rules

A. Minn. R. 7861.0210, Subp. 44, Item B(15). Definitions - Random number generator.

As proposed, Subpart 44, Item B(15) is the last item in a list of specific "recognized statistical tests." Subitem 15 is "<u>other recognized statistical tests determining the desired 99 confidence level</u>."[5] The phrase that constitutes subitem 15 is not grammatical, and as a result is unclear. The phrase "other recognized statistical tests determining the desired 99 confidence level" does not make sense without the word "percent" after the number 99. To cure this defect, the ALJ recommends that the sentence be changed to read "other statistical tests recognized by the board that result in the required confidence level of 99 percent."

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[1] Minn. Stat. § 14.26, subd. 3.
[2] Minn. R. 1400.2100.
[3] In order to be constitutional, a rule must be sufficiently specific to provide fair warning of the type of conduct to which the rule applies. *See Cullen v. Kentucky*, 407 U.S. 104, 110 (1972); *Thompson v. City of Minneapolis*, 300 N.W.2d 763, 768 (Minn. 1980).
[4] Minn. R. 1400.2100.
[5] To facilitate understanding, underlined text denotes proposed language.

B. Minn. R. 7861.0285, Subp. 3, Item E(2) and 7861.0290, Subp. 4, Item F(2). Operation of progressive electronic pull-tab game.

Both of these rules propose, in part, to ensure that certain winners will be paid "within four business days of the signed prize receipt." Each section also states that a winner may be paid in cash if the prize is less than $600. Both provisions regarding the payment of cash are unclear and therefore defective because, unlike the section pertaining to winners paid by check, there is no timeline provided for the payment of cash. The ALJ recommends that the sections on the payment of cash prizes be amended to make clear whether cash prizes must be paid immediately upon presentation of a signed prize receipt or if the organization has a period of time in which to make payment. A change stating that cash prizes must be immediately paid would make the rule clear and would not constitute a substantial change to the rule.

C. Minn. R. 7863.0270, Subp. 7. Application software.

As submitted, Subpart 7 provides:

> Subp. 7 **Application software.** All application software must be owned or developed by the linked bingo game provider.
>
> A. For purposes of this subpart, application software is developed by the linked bingo game provider if the linked bingo game provider designs the central system, database, user interface, the program architecture, and programs the source code.
>
> B. ….
>
> C. Any application software to be used by the linked game provider must be wholly owned free and clear and without any obligation or condition by any entity other than the licensed linked bingo game provider.
>
> D. ….

Paragraph C seems to contradict the first sentence of Subpart 7 and results in impermissible vagueness. The first sentence allows two options: either the application software must be owned by the linked bingo provider or developed by the linked bingo game provider, but conversely Paragraph C makes the ownership of the application software mandatory. This may make sense if in the first part of the rule "ownership" is synonymous with "developed by" such that all that was really meant was ownership. If this is the intended meaning, the defect of vagueness can be cured by changing Subpart 7 to read: "All application software must be owned by the linked bingo game provider. Software developed by the linked bingo game provider must also meet the requirements of this subpart." If this proposed language is not consistent with the intended meaning, then the Board may submit alternative language that it believes will cure the defect and that is not a substantial change to the rule.

D. Minn. R. 7863.0270, Subp. 9. Independent Verification Check.

This subpart states, in part, that "the independent verification check ability is required for all application software that may affect the integrity of the game." This part of the rule is impermissibly vague and fails to provide sufficient standards for enforcement because it is not clear what software the Board believes may affect the integrity of the game. This defect can be cured by changing the sentence to read that "the independent verification check ability is required for all application software that the board determines may affect the integrity of the game." This change would make clear that the authority for determining what software may affect the integrity of the game lies with the Board.

E. Minn. R. 7863.0270, Subps. 26 and 27. Reporting requirements of electronic accounting system and Electronic linked bingo game reports.

Subparts 26 and 27 as submitted contain some internal contradictions and some unclear references that render the parts impermissibly vague. Subpart 26 states that:

> The electronic linked bingo game system must provide the following reports to authorized personnel. Authorized personnel include the linked bingo game provider and the distributor providing the game, the licensed organization offering the game, and the employees of the Gambling Control Board and the Department of Revenue.

No reports are identified in Subpart 26 so it is unclear what "the following reports" refers to in that first sentence. Implicitly, Subpart 26 must be referring to the reports listed in Subpart 27. While Subpart 27 does list a number of reports, it also lists at least one required capability that does not appear to fit the term "report" (Subpart 27, C. 6). The ALJ also notes that Minn. R. 7864.0235, subp. 29, has similar report requirements for electronic pull-tab accounting systems but that subpart lists the required reports as subsections of the subpart. Subpart 29, thus, makes it clear as to which reports that subpart requires. The defect in Minn. R. 7863.0270, subps. 26 and 27, can be cured by making Subpart 27 into a subsection of Subpart 26, similar to the approach taken in Subpart 29.

The confusion in Subpart 26 is compounded by the fact that it states that the reports must be available to authorized personnel, a term the subpart then defines to include employees of the Gambling Board and four other entities. Conversely Subpart 27 only requires that the reports listed in Subpart 27 be available to "the board." If the two subparts are to be read in conjunction then the reports in Subpart 27 would need to be available to the authorized personnel identified in Subpart 26. This defect can be cured by replacing the word "board" throughout Subpart 27 with the words "authorized personnel." In addition, unless it is intended that every employee of the Gambling Control Board and the Department of Revenue be "authorized personnel" under this rule, the word "authorized" should be added before "employees" to make

clear that only those employees authorized by the respective entity are "authorized personnel" under the rule. If this proposed language is not consistent with the intended meaning, then the Board may submit alternative language that it believes will cure the defect and that is not a substantial change to the rule.

F. Minn. R. 7863.0270, Subp. 29, Item C. Electronic game system security.

This rule subpart states that "The electronic game system must be secure from all other communication systems or users at a gambling site." The SONAR does not explain this rule section by section. However, the generally stated purpose of this rule is to "ensure the integrity of the systems and games."[6] To that end and for the purposes of providing sufficient clarity on its standards for enforcement, the word "or" in the sentence should be replaced with the word "and" in this subpart. To ensure the integrity of the systems, it is reasonable to require the electronic game system to be secure from both other communication systems and users at a gambling site. As proposed, the rule is defective because this meaning is not conveyed through the use of the word "or" and would be conveyed through the use of the word "and." The recommended substitution would cure the defect. This defect is repeated in in Minn. R. 7864.0235, subp. 33, item C. If the Board chooses to cure this defect it should do so in both items.

G. Minn. R. 7863.0270, Subp. 30. Firewall protection.

This subpart states, in part, that "the firewall application must maintain an audit log of the following information and must disable all communications if repeated unauthorized access is detected." This rule subpart is impermissibly vague and fails to provide sufficient standards for enforcement since the meaning of "repeated unauthorized access" is unclear. The SONAR provides no guidance on the intended meaning of this section. If "repeated unauthorized access" means "more than one attempt at unauthorized access," such that one attempt is permissible, the defect could be cured by replacing the words "repeated unauthorized access" with the words "more than one unauthorized access." If some numeric standard higher than two attempts was intended then the defect can be cured by setting a numeric threshold above which communications must be disabled. If this proposed language is not consistent with the intended meaning, then the Board may submit alternative language that it believes will cure the defect and that is not a substantial change to the rule.

H. Minn. R. 7863.0270, Subps. 36, Items (F) and (G)(3). Prior board approval required for Electronic gambling equipment.[7]

This subpart generally pertains to a linked bingo game provider's rights to due process when the Board withholds or withdraws approval for an electronic linked bingo

[6] SONAR p. 41.

[7] The numbering of these sections was revised between the initial proposed rules and the final proposed rules. What was originally proposed as F and G was collapsed under F. What had been proposed H became proposed G.

game. This proposed subpart contains a number of defects that render it impermissibly vague. It also contains some areas that would be clearer if some technical amendments were made.

These subparts state that:

> F. Within 14 days of receipt of an electronic linked bingo game, the director must notify the linked bingo game provider in writing of the director's decision to recommend approval or denial.
>
> (1) The written notice to recommend denial, or denial by the board, must state the basis for the recommendation or the denial.
>
> (2) Within 14 days of receipt of a notice recommending denial, the linked bingo game provider may request a contested case hearing under Minnesota Statutes, chapter 14.
>
> (3) The board shall withdraw its approval if it determines that the electronic gambling equipment was not manufactured in such a manner to be tamper-resistant. If the board decides that its approval should be withdrawn, the board must issue an order initiating a contested case hearing under Minnesota Statutes, chapter 14.
>
> G. Linked bingo game providers are in compliance if the electronic gambling equipment is approved by the board and is produced in compliance with the standards prescribed in this part. Once approved, a linked bingo game provider may not change the equipment without prior approval of the board, in compliance with this subpart and part 7863.0260, subpart 1a.

Subpart F(1) states that "the written notice to recommend denial, or denial by the board, must state the basis for the recommendation or the denial." It is not apparent what the intended difference is between the Board "recommending denial" and "denial." Subpart F(2) refers to "recommending denial" but not to "denial." This lack of clarity renders this section impermissibly vague and fails to provide sufficient standards for enforcement because it is not clear how the process for, or rights of, the game provider differ in each instance. The Administrative Law Judge recommends that this defect may be cured by striking the term "recommend denial" and using only the term "denial." If this change would alter the intended meaning of the board's proposed rules the board should submit proposed language changes to clarify the difference between the terms and the different resulting processes and consequences, if any.

I. Minn. R. 7864.0235, Subp. 6. Application software.

As submitted, Subpart 6 provides:

Subp. 6. Application Software. All application software must be owned or developed by the manufacturer.

A. For purposes of this subpart, application software is developed by the manufacturer if the manufacturer designs the central system, database, user interface, the program architecture, and programs the source code.

B. A licensed manufacturer may jointly develop application software for an electronic linked bingo system or an electronic pull-tab system with a licensed linked bingo game provider if the jointly developed application software permits the operation of electronic pull-tab games on the same electronic linked bingo or electronic pull-tab device.

C. Any application software to be used by the manufacturer must be wholly owned free and clear and without any further obligation or condition by any entity other than the licensed manufacturer.

D. ….

As in the discussion regarding Minn. R. 7863.0270, subp. 7, above, paragraph C seems to contradict the first sentence of Subpart 6 and results in impermissible vagueness; as such it is defective. The first sentence allows two options: either the application software must be owned by the linked bingo game provider or developed by the linked bingo game provider, but conversely paragraph C, makes ownership of the application software mandatory. The second section seems to contradict the first section because the first section allows two options: the application software must be owned or developed by the linked bingo game provider, but conversely section C makes the ownership of the application software mandatory. This makes sense if in the first part of the rule" ownership" is synonymous with "developed by" such that what was meant was ownership. If this is the intended meaning, the defect of vagueness can be cured by changing Subpart 6 to read: "All application software must be owned by the linked bingo game provider." If this proposed language is not consistent with the intended meaning, then the Board may submit alternative language that it believes will cure the defect and that is not a substantial change to the rule.

J. Minn. R. 7864.0235, Subp. 33, Item C. Electronic game system security.

This rule subpart states that "The electronic game system must be secure from all other communication systems or users at a gambling site." The SONAR does not explain this rule section by section. However, the generally stated purpose of this rule is to "ensure the integrity of the systems and games." To that end and for the purposes of providing sufficient clarity on its standards for enforcement and therefore curing this defect, the word "or" in the sentence should be replaced with the word "and" in this subpart. To ensure the integrity of the systems, it must be that the electronic game system must be secure from both other communication systems and users at a gambling site. This meaning is not conveyed through the use of the word "or" and would

be conveyed through the use of the word "and." If this proposed language is not consistent with the intended meaning, then the Board may submit alternative language that it believes will cure the defect and that is not a substantial change to the rule.

Conclusion

None of the changes recommended above to the parts of the proposed rules that have been found to be defective would render the rule substantially different from the rule as initially proposed.

2. Technical Suggestions

Assuming the Board takes the appropriate steps to correct the above identified defects, there are other language changes in the rules the Administrative Law Judge recommends be considered to clarify or improve the readability of the proposed rules. In addition, the Board may make other technical changes to improve the clarity and readability of the rule as long as the changes do not constitute a substantial change to the rules as initially proposed. The wording changes suggested below do not denote defects in the proposed rules. The suggested changes are as follows**:**

A. Minn. R. 7861.0210, Subp. 49. Definitions – State Registration Stamp.

This subdivision states that the "state registration stamp" is required by Minn. Stat. § 349.162, subd. 1. However, there is no mention of a state registration stamp in this statutory provision. Instead, the registration stamp language is found at Minn. R. 7863.0220, subp. 3(A). To clarify the meaning of this phrase, the Administrative Law Judge recommends that the Board replace the citation to Minn. Stat. § 349.162 with the governing rule part, or, at a minimum, add the rule cite after the statutory cite.

B. Minn. R. 7863.0260, Subp. 1, Item D(4). Board approval; purchase of lease of gambling equipment and linked bingo services.

As submitted this item states that electronic linked bingo system leases must contain "a prohibition that the electronic linked bingo devices must not be transferred to another permitted premises unless prior written approval by the board is obtained." The section as proposed is confusing and sounds as if it contains a double negative. The Administrative Law Judge suggests that the meaning of this clause would be clearer if it read "electronic linked bingo system leases must contain a clause prohibiting the device from being transferred to another premises unless prior written approval by the board is obtained."

C. Minn. R. 7863.0270, Subps. 26 and 27. Reporting requirements of electronic accounting system and electronic linked bingo game reports and Minn. R. 7864.0235, Subp. 29.

These rule subparts were also listed in the defective rule section of this memorandum. They are listed in this technical suggestions section for a different reason. Both subparts contain lists, or refer to lists, of required reports. In both subparts, one of the delineated reports is "Real-time site activity capability." Requiring a function such that regulators can view real-time live activity at a gambling site does not fall into the common understanding of the term "report." The Administrative Law Judge suggests that the list of required reports would be clearer if this section were removed from the list of reports and moved to an appropriate section or a separate section. In the alternative, in order to make the item more clearly part of a list of reports, the term "real-time site activity capability" could be changed to read "real time site activity report."

D. Minn. R. 7863.0270, Subp. 36, Items F and G(3). Prior board approval required for electronic gambling equipment.

With respect to the second sentence in Subpart F(3), the Administrative Law Judge suggests that the rule would be more consistent, and more in keeping with due process under chapter 14, if the sentence read that "if the board decides that its approval should be withdrawn, the board will notify the provider of its right to request a contested case hearing under Minnesota Statutes, chapter 14." This proposed language is inconsistent with the right to a contested case hearing set forth in section (2) of this subpart. The board may also consider moving Subpart F(3) to below Subpart G because the latter addresses approval by the board and F(3) addresses withdrawal of that approval. This is a technical suggestion and not a finding of a defect, however, the meaning of Subpart F(3) may be rendered clearer if it is placed in context, after Subpart G.

B. J. C.